

**Before the
Federal Communications Commission
Washington, D.C. 20554**

_____)	
In the Matter of)	
)	
Empowering Consumers to Prevent and Detect)	CG Docket No. 11-116
Billing for Unauthorized Charges (“Cramming”))	
)	
Consumer Information and Disclosure)	CG Docket No. 09-158
)	
Truth-in-Billing and Billing Format)	CC Docket No. 98-170
_____)	

REPLY COMMENTS OF SEARCH ENGINE PLUS

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December 5, 2011

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REPLY COMMENTS OF SEARCH ENGINE PLUS

Search Engine Plus (“SEP”),¹ by and through its attorneys, submits these reply comments in response to the comments submitted on the Federal Communications Commission’s (“Commission’s”) Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceedings.²

Commenters agree that the Commission’s authority to regulate third-party billing arrangements is limited, and that local exchange carrier (“LEC”) voluntary guidelines can be effective alternatives to regulation.

In light of the important consumer benefits of third-party billing and collection, the true scale of the problem and the limits on the Commission’s authority to regulate in this area, SEP

¹ As discussed in its comments, SEP provides search engine optimization, registration of business customers with all of the major search engines (Yahoo, Google, Bing, etc.), unlimited on-line data back-up, and personal content protection. *See* Comments of Search Engine Plus, CG Docket No. 11-116 et al. at 1-2 (filed Oct. 24, 2011) (“SEP Comments”). SEP bills its services as a monthly fee on the customer’s business telephone line, which has proven to be both a low cost alternative to other billing methods and a significant convenience for customers. SEP verifies each and every order submitted in accordance with LEC third-party billing procedures.

² *See Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (“Cramming”),* CG Docket No. 11-116, Notice of Proposed Rulemaking, FCC 11-106 (rel. July. 12, 2011) (“NPRM”).

respectfully submits that this proceeding should be terminated and the Commission should instead work with the industry to fine tune the voluntary measures that the industry has in place to reduce instances of cramming.

I. THE NPRM OVERSTATES THE PREVALENCE OF CRAMMING IN THIRD-PARTY BILLING AND COLLECTIONS

The NPRM concludes that cramming is a significant problem based on an incomplete picture of third-party billing. However, the LECs, which are on the front lines of customer billing inquiries, have offered an important perspective on the alleged cramming problem. The actual experiences of the LECs show that the instances of alleged cramming (much less proven cramming) are a small drop in the bucket when compared to total third-party charges that are placed on LEC customer bills.

For example, AT&T stated, “[c]ramming is certainly an issue that must be dealt with, but when viewed in context, the reported instances of cramming, which number in the thousands annually, pale in comparison to the number of consumers with third-party billed charges, which number in the tens of millions.”³ Further, “[i]n AT&T’s experience, the overwhelming majority of third-party charges on its wireline bills are legitimate.”⁴ AT&T’s experience with alleged instances of cramming is similar to the numbers that the Commission is seeing in complaints (a few thousand annually), however, when compared to the tens of millions of third-party billed charges annually, the scope of the alleged problem shrinks dramatically.

CenturyLink agrees that “the incidents [of cramming] are not high as a percentage of total billed transactions.”⁵ Further, CenturyLink found that, “the number of cramming complaints

³ Comments of AT&T Inc., CG Docket No. 11-116 at 2 (filed Oct. 24, 2011) (“AT&T Comments”).

⁴ *Id.* at 7.

⁵ Comments of CenturyLink, CG Docket No. 11-116 at n.50 (filed Oct. 24, 2011) (“CenturyLink Comments”).

decreased each quarter in 2010” and “cramming complaints were not even among the top 5 complaint categories reported out by the Commission in 2010.”⁶

These first-hand experiences should be given great weight. The LECs’ experiences demonstrate that the vast majority of third-party charges on LEC bills are legitimate. While cramming is an important issue for the industry to address, the scope of the problem is not as broad as the NPRM makes out. The Commission should keep this perspective in mind when considering the necessity for, and scope of, regulatory requirements when weighed against the effective voluntary industry practices discussed below that have been undertaken by the LECs, billing aggregators and service providers to curtail instances of cramming.

II. COMMENTERS AGREE THAT THE COMMISSION’S AUTHORITY TO REGULATE THIRD-PARTY BILLING AND COLLECTION IS LIMITED

In its comments, SEP asserted that the Commission should be mindful that its authority over third-party billing services is limited.⁷ Indeed, for the past two decades, the Commission has recognized that it does not have authority pursuant to Title II of the Communications Act to regulate billing and collection services, which are not communications, but rather financial and administrative services.⁸ Further, SEP contended that while the Commission can regulate the format and content of a telephone carriers’ bills under its Title I authority, it may not extend its authority to prohibit LECs from offering billing and collection services.⁹

Other commenters, including specifically the LECs, agree that the Commission does not have authority under Title II to regulate third-party billing and collection services.¹⁰ Further, the

⁶ *Id.*

⁷ *See* SEP Comments at 2-6.

⁸ *See Billing and Collection Services*, Report and Order, 59 Rad. Reg. 2d 1007 (1986) (“Billing and Collection Services Order”).

⁹ *See id.* at 2.

¹⁰ *See e.g.*, AT&T Comments at 17 (“Section 201(b) only applies to common carrier ‘practices...for or in connection with *common carrier services*.’ Third-party billing

courts have agreed that the Commission's Title II authority does not extend to regulation of third-party billing and collections. For example, the Court of Appeals for the Second Circuit came to this conclusion when considering the case of information providers ("IPs") operating pay-per-call information and entertainment services that were billed through a tariffed service called InfoFone by Verizon LECs.¹¹ Verizon removed the InfoFone service from its tariffs and plaintiffs brought suit in part under the Communications Act.¹² The Court affirmed dismissal by the district court and found that "the IPs seek the continuation of services that are not regulated by either the 1934 or 1996 Act" because "the FCC has determined that billing and collection services are not 'telecommunications services' as defined by Title II of the Communications Act."¹³ The Commission correctly determined in 1986, and the courts have since agreed, that third-party billing and collection services are not communications services subject to Title II regulation.

Commenters also agree with SEP that the Commission has not met the two-part test from the *Comcast* decision to exercise Title I authority over third-party billing and collection services.¹⁴ SEP contended that even if third-party billing services were within the subject matter

services provided by carriers, however, are not common carrier services.") (emphasis added); and *See* Comments of Verizon and Verizon Wireless, CG Docket No. 11-116 et al. at n.13 (filed Oct. 24, 2011) ("Verizon Comments") ("It has long been established that carrier billing or collection for third parties falls outside Title II of the Communications Act").

¹¹ *Chladek v. Verizon N.Y. Inc.*, 96 Fed. Appx.19 (2nd Cir. 2004).

¹² *Id.*

¹³ *Id.* at 22.

¹⁴ The two-part test states that the Commission "may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission's general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010) (citing *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005)).

of Title I,¹⁵ the proposals to regulate the content of those services are not “reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”¹⁶ AT&T agrees that the “Commission has identified no statutorily-mandated responsibility to regulate third-party billing services under [Title II, III or VI], and thus its exercise of Title I authority here would not be ‘ancillary’ to anything.”¹⁷ Further, Verizon agrees that “any claim of ancillary authority under Title I by the Commission would fail, in part, because there is no substantive statutory provision in Title II to which the proposed action would be ancillary.”¹⁸ While the Commission can regulate the format and content of a telephone carrier’s bills under its Title I authority, it may not extend its authority to prohibit LECs from offering billing and collection services.¹⁹

¹⁵ See AT&T Comments at 19 (“Title I grants the Commission general jurisdiction over ‘interstate and foreign communications by wire or radio’ and ‘the Commission has held that carrier-provided third-party billing services are not transmission services, but rather ‘a financial and administrative service.’”) (citing Billing and Collection Services Order, ¶ 32.).

¹⁶ SEP Comments at 5 (citing NPRM, ¶ 85). In the Billing and Collection Services Order, the Commission recognized that “[t]he exercise of ancillary jurisdiction requires a record finding that such regulation would ‘be directed at protecting or promoting a statutory purpose.’” Billing and Collection Services Order ¶ 37 (citing *Second Computer Inquiry*, 77 FCC 2d 384, 433 (1979), *aff’d on reconsideration*, 84 FCC 2d 50, 92093 (1980), 88 FCC 2d 512 (1981), *aff’d sub nom. CCIA v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom. Louisiana P.S.C. v. United States*, 461 U.S. 938 (1983)).

¹⁷ AT&T Comments at 20.

¹⁸ Verizon Comments at n.13.

¹⁹ In addition, SEP established in its comments that a complete ban on third-party billing would be an unconstitutionally overbroad restriction on commercial speech and the LECs agree. See SEP Comments at 6-7; Comments of Frontier Communications Corporation, CG Docket No. 11-116 et al. at 7 (filed Oct. 24, 2011) (“Frontier Comments”) and AT&T Comments at 2, 8.

III. THE INDUSTRY HAS UNDERTAKEN EXTENSIVE AND EFFECTIVE EFFORTS TO REDUCE INSTANCES OF CRAMMING

A. Legitimate Third-Party Billing And Collection Is Beneficial To Consumers

Local exchange carriers are in the best position to know and understand the demands of their customers.²⁰ They have strong incentives to protect their customers against instances of cramming. According to Verizon, “[s]ince unauthorized charges on customers’ bills could significantly harm customer relationships in a highly competitive environment, Verizon and Verizon Wireless have significant incentives to prevent such charges.”²¹ LECs know that their customers do not want to see unauthorized charges on their bills, however, the LECs also understand that their customers realize important benefits from including charges for third-party goods and services on a single LEC monthly bill.²²

Specifically, LEC customers enjoy the ability to purchase the low-cost third-party goods and services that result from the fact that the third-party service providers do not have to set up onerous billing and collections departments. In addition, LEC customers enjoy the ease and convenience of third-party billing, which allows them to pay for many different goods and services on a single bill. As an example, Verizon stated that it permits third-party charges to be placed on its bills because “customers prefer to review and pay a single bill for these services.”²³

²⁰ See Frontier Comments at 3 (LECs have a “unique understanding of their customer base”).

²¹ See Verizon Comments at 1.

²² The incentive for LECs to permit third-party billing is not financial, but customer demand. According to one LEC, “[t]hird-party billing is not a significant revenue stream for Frontier. Rather, Frontier offers it to allow consumers the broadest choice possible in purchasing and paying for telecommunications-related products and services.” Frontier Comments at 7.

²³ Verizon Comments at 1.

Further, “customers prefer one-stop shopping for these services and it is an easy, efficient way to make certain types of purchases.”²⁴

The nation’s largest billing aggregator Billing Concepts, Inc., doing business as BSG Clearing Solutions (“BSG”), confirmed that without the ability to place charges on LECs bills, many of its third-party service providers would not be able to provide low-cost services to customers and would go out of business. Billing Concepts stated that,

the costs of maintaining independent billing and collection infrastructure would be prohibitive for many of BSG’s service providers. Additionally, consumers would lose the benefit of a single bill, forcing them to choose between a vendor’s lower prices and the convenience of a single monthly payment. Without the ability to place charges on consumers’ telephone bills, many of BSG’s service providers would simply cease to exist and their markets would become less competitive.²⁵

Therefore, if the Commission were to ban third-party billing, or impose such onerous regulations as to increase costs and effectively ban the practice, LEC and third-party provider customers would lose out on the low-cost goods and services that they can currently purchase with the ease and convenience of a single monthly bill.

B. Industry Guidelines are Effective and Can Be Strengthened if Necessary

In 1998, at the urging of the Commission, the telecommunications industry developed new anti-cramming guidelines.²⁶ Pursuant to these voluntary efforts, in order to place a charge on a LEC’s bill, SEP will complete its own verification process and must comply with the detailed requirements imposed, via contract, by the billing aggregator and the LEC. This generally includes pre-screening, review of marketing materials, and monitoring and compliance with complaint thresholds. The charge is then generally placed in a separate section of the LEC

²⁴ *Id.* at 2.

²⁵ Comments of Billing Concepts, Inc., CG Docket No. 11-116 et al. at 10 (filed Oct. 24, 2011) (“BSG Comments”).

²⁶ *See FCC and Industry Announce Best Practices Guidelines to Protect Consumers from Cramming*, FCC News Release (rel. July 22, 1998).

bill to avoid customer confusion. If a customer complains that he or she did not authorize the charge, then a refund is provided (generally whether or not the customer is correct) and the LEC offers the customer third-party bill blocking.

As an example, AT&T includes cramming prevention measures in its contracts with third-party providers or billing aggregators, including an application and approval process, active monitoring of customer notification, consent and verification requirements, billing dispute arrangements and steep penalties for *alleged* instances of cramming.²⁷ Billing aggregators are subject to cramming complaint thresholds and annual audits.²⁸ All charges are displayed in a separate section of AT&T's bills, but if a customer alleges that a charge was unauthorized, AT&T removes the charge from the bill and offers that customer third-party bill blocking.²⁹ These measures are adequate to address the limited cramming problem when viewed in the appropriate context of the millions of third-party charges that are placed on bills each month.

IV. CONCLUSION

Third-party billing and collection offers consumers low-cost services with the ease and convenience of a single bill. Alleged instances of cramming, while an important concern, are a mere drop in the bucket when compared to the number of third-party charges placed on LEC bills each month. Therefore, and in light of the Commission's lack of jurisdiction to regulate third-party billing and collections, the appropriate course of action is to rely upon market forces to discipline telephone company billing for third-party charges, as the Commission has done since 1986. The industry has adopted a voluntary code of billing guidelines that ensure services are knowingly authorized and that enable billing agents to quickly identify and root out

²⁷ See AT&T Comments at 8-9 (including a fee of \$150 for each *alleged* instance of cramming).

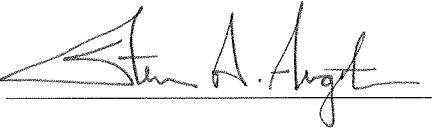
²⁸ See *id.*

²⁹ See *id.* at 8.

companies that violate the prescribed standards of conduct. This voluntary code can be further fine tuned, but it can adequately address instances of cramming.

Respectfully submitted,

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December 5, 2011